

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

76-2166

To be argued by:
NORMAN S. HATT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
HERBERT EDNEY, :
Petitioner-Appellant :
- against - :
HAROLD SMITH, Superintendent, Attica :
Correctional Facility,
Respondent-Appellee

-----x
DOCKET NO. 76-2166
On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR PETITIONER-APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from an order dismissing a petition for a writ of habeas corpus, entered on November 24, 1976, by the Honorable Jack B. Weinstein, United States District Judge for the Eastern District of New York. The order and memorandum are unreported and are reproduced at pages A-0 through A-44 of the Appendix.

In the District Court the petitioner-appellant proceeded in forma pauperis and was represented by James J. McDonough, Attorney-in-Charge of the Legal Aid Society of Nassau County, New York, who is continuing to represent the petitioner-appellant in this Court.

MEMORANDUM AND ORDER BELOW

On November 24, 1976, the United States District Court for the Eastern District of New York (Weinstein, U.S.D.J.) filed a memorandum and order dismissing the petition. The memorandum and order are reproduced in full at pages A-0 through A-44 of the appendix. The Court held that the New York State procedure--permitting the prosecution to call as a witness for the prosecution a psychiatrist consulted by the defendant at the advice of his attorney in order to prepare his defense--while not the preferable practice, did not amount to a violation of the constitution guarantee of the right to counsel.

THE ISSUE PRESENTED

Does the New York State procedure in criminal trials, permitting the prosecution to call as a witness for the prosecution a psychiatrist consulted by a defendant at the advice of his attorney in order to prepare his defense, violate the Sixth and Fourteenth Amendments' guarantee of effective assistance of counsel?

STATEMENT OF THE CASE

On April 4, 1974, the petitioner-appellant was found guilty, after a jury trial, of manslaughter in the first degree, kidnapping in the first degree, and kidnapping in the second degree. On May 3, 1974, he was sentenced to concurrent indeterminate terms of imprisonment of up to 25 (twenty-five) years, 25 (twenty-five) years to life imprisonment, and up to 25 (twenty-five) years on the respective charges. The petitioner is presently incarcerated serving these terms in the Attica Correctional Facility.

The petitioner contends that it was a violation of his constitutionally guaranteed right to the effective assistance of counsel to permit Dr. Schwartz, a psychiatrist, to testify over objection of the petitioner as a witness for the prosecution. The petitioner had previously consulted Dr. Schwartz on the advice of his attorney, but he had decided not to call Dr. Schwartz as a witness for the defense. In contrast to the three psychiatrists called as witnesses for the defense, Dr. Schwartz testified that in his opinion the petitioner was legally sane at the time of the crime. Use of the petitioner's own psychiatrist as a prosecution witness was a serious invasion of the confidentiality necessary for effective representation by counsel and constituted a violation of the Sixth and Fourteenth Amendments' guarantee of the assistance of counsel.

The petitioner has raised this claim in the state courts and has exhausted all remedies available to him in New York. His judgment of conviction was affirmed by the Appellate Division of the Supreme Court for the Second Judicial Department on April 7, 1975, 47 A.D.2d 906 (2nd Dept. 1975). The order of the Second Judicial Department was affirmed by the New York State Court of Appeals in an order dated June 8, 1976. People v. Edney, 39 N.Y.2d 620 (1976).

On July 14, 1976, the petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. By an order dated November 24, 1976, the petition was denied (Weinstein, U.S.D.J.). A certificate of probable cause was issued as part of the memorandum and order denying the petition. A timely notice of appeal was served thereafter.

STATEMENT OF FACTS

THE CRIME

On July 24, 1968, the Nassau County Police, after receiving a report of a disturbance behind the Nu-Way Lounge in Roosevelt, New York, found the body of Lisa Washington. The eight-year old girl was dead after having been stabbed eleven times. Investigation at the bar led the police to suspect the defendant, Herbert Edney. They arrested the defendant in the early morning hours at the home of his father in Roosevelt, and in response to a question by the father whether he had harmed the girl, the defendant stated, "I'm sorry, I'm sorry". At the police station, the defendant asked to see a psychiatrist and to be examined by a doctor. Later that morning the defendant signed a statement that he had been at the Nu-Way Lounge with Lisa, that he had been hearing "voices" telling him that God wanted him to send Lisa to Him, and that he might have killed her but did not remember doing so.

JURY TRIAL

People's Case

VINCENT GORDON testified that on July 24, 1968 the defendant arrived at 203 Princeton Street, Hempstead and went upstairs with Lisa (75-76)*. Somewhat later the defendant called Lisa to go to the store with him (77). They went up the street together and approached a cab (77,79). The defendant opened the door, grabbed Lisa by the arm, and pushed her in (79).

*Numbers in parentheses refer to page numbers of the transcript of the jury trial.

SHARON SPRADLEY testified similarly but could not identify the defendant as the man (87-102).

CLARA ROBERTS testified that she had lived periodically with the defendant since 1963 (111-112). She had one child Lisa Washington, who was eight years old in 1968 (107). From September 1967 to June 30, 1968 she, the defendant, and Lisa had lived together in the Bronx (115-116). In July, 1968 Lisa went to live with the witness' sister Lucille Glenn at 201 Princeton Street, Hempstead (109, 116). Lucille had visited the apartment several times and had known the defendant for 3 or 4 years (117). The defendant would sometimes take Lisa to visit Lucille and would also take Lisa out to dinner (117). On many occasions the defendant took Lisa places by himself (117).

Mrs. Roberts had told the defendant that she would move out if he did not. He had replied that if she did so, he would kill her if he could find her and, if not, he would kill her sister and cousin (109). She thought he had been drinking when he made these threats (126). He had always told her that he would not hurt the child (120-121). She moved out on July 23, 1968 (108).

LUCILLE GLENN testified that in July, 1968 Lisa was living with her at 201 Princeton Street, Hempstead (128). On July 23 the defendant, whom she had known for four years, came to her apartment (129-130). He asked whether she knew that Clara, her sister, had moved out taking all the furniture (130).

When she replied that she did, he asked if she knew where Clara was, but she stated that she did not and would not tell him even if she did (130). He said that if the furniture and his money were not returned, he would hurt the closest thing to Clara (130).

On July 24 between 3:30 and 4:00 p.m. the defendant returned to the witness' residence (131). She told him that she did not want him there (131). He said he was going to get some beer (131). She then went into her bedroom and, when she came out, the defendant and Lisa were gone (132). She noticed nothing unusual about defendant on either occasion (164).

Between 8:30 and 9:00 p.m. that same day Mrs Glenn received a phone call from the defendant in which he said that if she did not get Clara on the telephone in the next couple of hours he was going to rape and kill Lisa (134). The conversation ended after an exchange of profanities (134). She did not believe what he said (163).

The defendant had previously been kindly and affectionate toward Lisa (158). He used to bring Lisa from the Bronx to her house and would pick Lisa up by himself (158-159). This was the first time the defendant had taken Lisa anywhere without first advising her (159).

LOTTIE WASHINGTON, the mother of Lucille Glenn and Clara Washington, testified that defendant came to her house on Princeton Street on July 23 (166-167). He said he wanted to find Clara, and when she said Clara was not there, he insisted

that she was (168). She said he could search the house; he replied he would not do so (199).

The next day she had a further conversation with the defendant (169). He said that if he did not find Clara, he was going to hurt the closest thing to her (169). He then said he was going to the store to get some beer (169). She did not give permission to defendant to take Lisa, who was playing outside, since it was not her place to do so (169-170). She later looked for Lisa but could not find her (170).

JOAN TURNER testified that on July 24, 1968 she was employed at the Nu-Way Lounge in Roosevelt (209). She knew the defendant and had gone to high school with him (209). He entered the bar shortly after 9:30 p m with Lisa, and she said hello to him (210-211). She noticed nothing unusual about the defendant, except that he was just sitting staring off into space (211,237). Lisa was running around the bar, dancing and singing (211, 234). She walked away from defendant several times without his saying anything (238).

After a half hour or more the defendant and Lisa left but returned five minutes later, going to the rear of the lounge where the rest rooms were located (211-212). They then went out again and walked to the right (212). She later saw defendant, but not the child, coming around the corner (213).

LAY WARREN testified that on July 24, 1968 he was in the Nu-Way Lounge at approximately 9:30 p.m. (258). He had a conversation with the defendant whom he had known for 10 to 12 years (258-259). The defendant said that he needed a ride home for himself and his daughter (259, 265). He told defendant

that he would give him a ride but would not be back for 30 or 45 minutes (259). When he left 15 minutes later, the defendant and the girl were still there (260). He noticed nothing unusual about the defendant who seemed normal although he had never seen defendant intoxicated (260).

In a question and answer session on July 25, 1968 he had told the police that defendant had said that he felt bad, had rubbed his face and blindfolded himself while talking (262-264). As a result he had thought that defendant had had more to drink than usual (264).

VELVA WALLACE who lived next to the Nu-Way Lounge testified that on July 24, 1968 at about 10:00 p.m. she heard noises outside, which continued until she took her dog out at about 10:15 (266-267). She saw figures of a man and a woman or a girl by the garage 20 or 25 feet away and asked, "Who might that be?" (267-268, 272). The man replied that he was after his daughter and that it was none of her concern (267). She continued to walk her dog, noticing that something was wrong (268).

She went inside but came out again somewhat later to discover a bundle lying on the ground (268-269). She ran back inside to call the police (269).

SERGEANT ROBERT CLINE of the Scientific Investigation Bureau of the Nassau County Police Department testified that on July 24, 1968 at approximately 11:45 p.m. he responded to the Nu-Way Lounge (281-282). He examined the scene finding a body with 2 stab wounds in the front and 9 in the back

(283, 285). He removed a soil sample from the ground adjacent thereto and placed it in People's Exhibit 36 (283).

At approximately 4:30 a.m. on July 25, 1968 he took fingernail scrapings from the defendant, who appeared to be alert (286-287, 318). He found a longitudinal half-inch scar on the defendant's right thumb (288). The pinky finger of his right hand exhibited minute particles of blood (289). He observed a rather recent half-inch laceration on the left thumb covered by two compress bandages (289). He discovered traces of blood beneath each fingernail of the left hand (289). There was an approximately one-eighth inch long transverse streak of blood on the defendant's wrist (289).

At approximately 9:30 a.m. Detective Andreoli gave Sgt. Cline some clothing (290). He found several minute blood stains on the pants but none on the shirt (291). The left shoe revealed two blood stains and both shoes were covered with dirt and white colored water stains (291). He removed a sample of dirt and compared it with the samples which he received from Sgt. McCauley at approximately 10:30 a.m. and which he himself had taken at the scene (291, 454). All of the samples were compatible (292). A Timex wristwatch also carried several minute blood stains (292-293).

DETECTIVE ROBERT W. BRICE, JR., of the Nassau County Police Department testified that on July 25, 1968 he arrested the defendant at his father's residence (330-334). As they were leaving the house the defendant's father said, "Herbert, did you hurt that child?" (335). The defendant hung his head and said, "I'm sorry. I'm sorry" (335). Detective Brice then took the defendant to the First Squad Police Station (336).

INSPECTOR DANIEL GUIDO testified that at 10:30 a.m. on July 25, 1968 he saw the defendant with Sgt. McCauley, Det. Andreoli and Det. Strauber at police headquarters (381-383). The defendant said to him, "Get me a head doctor" (383-384). He asked the defendant why he wanted a head doctor and defendant replied that he couldn't believe the charge; he said, "How could I hurt the child?" The defendant stated that he loved the child. He wanted to see whether he was human or animal (384). Inspector Guido suggested to the defendant that he tell the truth and then they would see whether they could help him (384). {

The defendant said that he had told the truth and asked where he had lied (384). Inspector Guido told the defendant that he had lied when he had said that he had not called Lucille and threatened to kill Lisa (384). The defendant replied that he had called Lucille but had not said that he would kill Lisa (384).

After a conversation between Inspector Guido and Detective Strauber as to what Lucille had told the police, the defendant said, "Well, I am confused. I've been hearing voices for a while now" (385). The defendant said the voices had told him that God wanted him to send the child to him (385). He had unsuccessfully tried to shake the feeling off by smoking half a marijuana cigarette in the restroom at the Nu-Way Lounge (385). He said that he had left the bar with Lisa but remembered nothing further until he woke up in his father's house (385). The defendant said that he must have dreamed

that he put Lisa in a cab; he did not remember stabbing her (385-386). He had a knife that night but did not know what had become of it (386). The defendant began crying as he agreed to give a written statement (386-387, 394).

DETECTIVE SARGEANT JOHN McAULEY of the Nassau County Police Department testified that at about 5 a.m. he obtained dirt granules from the defendant's pockets and gave them to Sgt. Cline (468). He also took the defendant's wallet. Members of the police force called about six psychiatrists but they were unable to locate one who was willing to examine the defendant (419-420).

DETECTIVE EDMUND STRAUBER of the Nassau County Police Department testified that he saw the defendant at the First Precinct on July 25, 1968 (432-433). The defendant saw a picture of Lisa, picked it up, and cried for a few minutes (434). Later at Headquarters Det. Strauber was present during the defendant's conversation with Inspector Guido and heard the defendant say:

I would like a doctor. Get me a doctor--get me a head doctor---If I really did this crime, something must be wrong with me (435).

Det. Strauber then sat in while Det. Andreoli took the defendant's written statement and his recollection of the substance of the defendant's narration of the events was as follows:

he went into a bathroom at the Nu-Way Lounge and smoked half a marijuana, and then heard

voices telling him that God wanted Lisa, and he said he remembers walking . . . out of the Nu-Way Lounge. He doesn't remember going to the back of the bar. He also said that he had purchased a knife or had a knife with him and didn't know what happened to it (436).

DR. LESLIE LUKASH Chief Medical Examiner of Nassau County, testified that he performed an autopsy on Lisa which revealed 11 stab wounds--9 in the back, one in the right side of the chest, and one over the right arm (449). She had died from massive hemorrhage resulting from penetration of knife wounds into the lungs and heart (450). A knife could have produced the wounds (450).

DETECTIVE HENRY A. ANDREOLI of the Nassau County Police Department saw the defendant at the First Precinct at about 3:30 a.m. on July 25, 1968 (459). The defendant said that he had put Lisa into a cab, but variously described the cab as a yellow cab, at the cab stand, cruising and unknown (461). When he showed the defendant a picture of Lisa, the defendant hugged it, and rocked back and forth sobbing (461). He claimed he had never been behind the Nu-Way Lounge (462).

The defendant had a cut on his left thumb which he attributed to a fight with a neighbor of his father (462-463, 511). The defendant stated that he wanted to be examined by a psychiatrist, but of six psychiatrists called, two did not answer and four refused to come (463). At about 4:40 a.m. he took a statement from defendant indicating that the latter desired to see a psychiatrist (463, 491).

At headquarters as they were leaving a room, the defendant asked Inspector Guido if he could talk with him (467). The

defendant said that:

he was ashamed to tell us about hearing the voices of God, and he told us that four or five times this voice told him. . . to bring Lisa to God, and he attempted to throw her off the balcony of the fourteenth floor (467).

The defendant then gave a statement and also said that he had taken LSD a few days before the crime and had been taking pills (495). He also said that he had put Lisa into a cab (504-505). Det. Andreoli noticed nothing unusual about the defendant although the latter did sob two or three times in his presence (470-471, 507).

The defendant's statement read as follows:

When I was in the Nu-Way Bar with Lisa, I went into the bathroom and I smoked half a marijuana cigarette. I heard a voice say 'Send Lisa to God.' He wanted her. I heard this voice again three times. It said the same thing each time. I believed in the voice.

I remember leaving the bar with Lisa, but I do not remember walking to the rear of the building with Lisa. It seems like I killed her, but I do not remember doing it.

There were five other times that I came close to taking her life. Each time I would be out on the porch with her on the 14th floor of my apartment. I would get the feeling to throw her over, then I would gain control of myself and walk back into the apartment or go downstairs. Each time I would have had been smoking marijuana.

Last time it seemed like a dream that I put her into a cab.

I had an Italian folding knife. The blade was four inches long and it locked when I opened it. I know that I had it on me when we were in the bar. I do not recall the knife after that.

I have read this statement and it is the truth (473-473).

JOSEPH R. MEDINA testified that he lived next door to defendant's father in July, 1968 (481). About 7:30 p.m. the defendant came over and threatened him saying that he had said something to defendant's father (481-482). No physical contact between him and the defendant took place (482).

Defendant's Case

HERBERT D. EDNEY, SR., the defendant, testified that he had been living with Clara and Lisa periodically for six years (534). In July, 1968 he was working as an apprentice fur cutter and process server (533). On Sunday, July 21 he drank a lot, smoked marijuana and took LSD (536-538, 597). He worked on Monday, and on Tuesday he testified in court (542). When he arrived home, he discovered that all of Clara's furniture was gone (542, 604). He laughed, knowing that she had been planning to leave, since they had discussed it 9 or 10 times (543).

He tried to call Clara's mother but there was no answer (544-545). He took the subway to Jamaica and a cab to his brother's house in Hempstead (545). He went with his brother to a bar in Hempstead where they discussed what had happened (545). They then went to Clara's mother's [Lottie Washington] house where he went up alone (545, 606). Clara's mother, Lisa, Lucille and her husband were there, and he spoke with Clara's mother (545-546).

He went back to the city and visited a few bars, later

waking up on his balcony with the DT's (547-548, 607). He drank scotch and beer for breakfast and observed little green men and snakes (548, 608). On the way to work he met two Spanish girls with whom he agreed to go to a hotel (548-549). When he returned, he went to work, received his pay check and cashed it (549, 611). After he had done so, he bought a 3 1/2 or 4 inch knife to protect himself from the girls, in case the arrangement was a set-up (549-550, 612).

He met the girls and went to a hotel where they smoked marijuana, and drank a bottle of scotch and some beer (551-552). He had two or three marijuana cigarettes, and when they tried to undress him, he resisted saying he thought somebody was under the bed or in the closet (552). He became angry and they left (552).

He went to a bar, threw up, and then had a few drinks (552, 621). Then, while walking on Fifth Avenue, he saw a child mannequin and thought of Lisa (552-553, 622). He wanted to give her the \$300 he had received upon cashing his check (553). He recalled also that his father had said that a neighbor, named Medina, had been harrassing him (553).

At Penn Station, he drank at Sarasin's Bar (544, 623). On the train he smoked a marijuana cigarette between cars, became sick, throwing up some blood (554, 623-625). He fell asleep and the conductor woke him up at Hempstead (554). He walked to a bar, had a few drinks and smoked a half of a marijuana cigarette in the bathroom (555, 625-626). He then went to Clara's mother's house, hugged and kissed Lisa, and was warmly greeted by Lucille and Clara's mother (556).

After talking with Clara's mother [Lottie Washington] for a while he went to get some beer for himself and some

bread for her (557). He asked Lisa if she wanted to go with him, and Clara's mother said it was O.K. (558, 567). Lisa had permission to go to the store with him but not elsewhere (636).

He told Lisa he was going to his father's house and she said she wanted to go with him (558). He said no, but when she insisted, he agreed (559). Just then a cab pulled up driven by an old friend and they got in (559). On the way, as they passed the Nu-Way Lounge, he remembered that he wanted to see the manager of the bar and stopped to look for him (560). Since he was not there, they went to another bar where he had quite a few drinks (560-561, 699).

He then took a cab to his father's house but found that his father was not at home (561, 699). He waited with the people downstairs, having another beer while Lisa played outside (561, 700). His father and sister Betty then came in (562). His father pointed out his neighbor, Mr. Medina, whom he approached and told to leave his father alone (562-563). They argued and Medina told him to get away before he blew his nigger brains out (563). He heard Lisa calling and walked away because he did not want her to see him act like a savage (563). He showed Betty the knife he had, and upon opening it, he cut his thumb and blood ran out onto his hand, watch, shirt, pants and shoes (564, 703, 706). Betty bandaged his thumb (564; 706).

The defendant's mother called and told him to take Lisa home (564, 707). He called a cab and asked to be driven to Clara's mother's house, but as they passed the Nu-Way Lounge

he decided to look for the manager, Mr. Patterson, again and asked the cab driver to wait (565, 707). He entered and spoke with Patterson for some time while Lisa ran around (565-566). He asked a friend, Lay Warren, to take him and Lisa to Clara's mother's house (566-567, 707). Warren asked him to wait and he had a few more drinks and a half a marijuana cigarette in the bathroom (567, 712). Upon noticing that it was late, he decided to take Lisa home without waiting for a ride (567).

He called Mrs. Washington to tell her he was coming, but when Lucille answered he said jokingly that they might go back over to his father's house (568). Lucille started cursing and he hung up (568). At no time had he mentioned Clara (569).

He had a few more drinks, thereupon suddenly feeling that his body had no bottom half (569-570, 718). He felt sick and when Patterson suggested he take Lisa home, he said that he would (570, 718). He last remembered having \$2.50 in his hand for cab fare, and he thought he recalled seeing a cab (570, 718). He had heard voices periodically all day (586).

He later woke up under a tree, not knowing where he was; his thumb was bleeding (570-571, 722). He rubbed the blood on his face and hair, urinated in someone's yard, and went to his father's house (571). He next remembered someone pounding on him, and upon awakening, seeing many lights and gun barrels in his face (571). He remembered little else until a time when he was in jail around October of that

year. (572-573).

When he had lived with Clara and Lisa, it was his responsibility to keep Lisa every night from 4 p.m. to 12 midnight and he took Lisa to about one hundred different places without asking permission (584-585).

DR. MORRIS BINDER, a psychiatrist, testified that he had examined the defendant on December 21, 1971 and on March 15, 1974 to determine his mental condition and his awareness of the nature and quality of the act with which he was charged at the time it occurred (642-643). The examinations were of the question and answer type during which he took a history and reviewed all the records available from Meadowbrook, Matteawan, and Pilgrim State hospitals (643-644). The examinations lasted two hours in 1971 and 1 1/2 hours in 1974 (644, 655-656).

On both occasions he diagnosed the defendant as schizophrenic, paranoid in partial remission (647). The disease appeared to be long standing, and his history showed him to have been mentally ill since 1958 (648). The taking of LSD, alcohol and marijuana would aggravate and accentuate the symptoms (648). The defendant described hallucinations including voices (649). In the opinion of Dr. Rinder, the defendant was in such a state of mental illness and confusion that he was unaware of the nature and quality of his act or that it was wrong (646).

ERMA HARRISON, the defendant's sister, testified that in 1968 Lisa was brought to her house about twice a month by the

defendant alone (737-738). The child was very affectionate toward the defendant, who loved the child dearly (739). At the arraignment the defendant, sitting in a daze, didn't recognize her (740).

BETTY JANE BOONE, the defendant's sister testified that she saw the defendant at about 6:30 p.m. on July 24, 1968 at her father's house, where defendant and Lisa were waiting when she and her father arrived (744-745). Lisa played outside while the defendant and her father talked (745). The defendant and the man next door then became involved in an argument, and at her father's request she called him in (746). The defendant said that if it were not for the children he would have cut the man (747). Then, showing her a knife, he cut his left thumb (747). There was enough blood that she had to wipe it off the floor (747). She then washed and bandaged the thumb (747-748).

The defendant said he had to take Lisa home, but she told him to wait until her husband got there (748-749). A little later the defendant said he'd better take a cab and left for Mrs. Washington's house (749). Her brother William had called and talked to defendant who acted perfectly natural (754-755).

WILLIAM EDNEY, the defendant's brother, testified that on July 23, 1968 he received a telephone call from the defendant, who said he had a little problem and would like to come out to talk about it (775-776). They had a drink together, and defendant said he was upset because Clara had taken all of his furniture and money (776-777). They then went to

Mrs. Washington's house and he waited in the car while the defendant went in (777). The defendant wanted to find out where Clara was so that he could get back his furniture and money (179). He went in to get the defendant, but since the defendant wanted to stay, he went home alone (778 779).

The next day the witness spoke with the defendant who said he was still trying to find out where Clara was (779-780). The defendant said he had the little girl with him, and the witness told the defendant to take the child home (780). The defendant said that he would and called back to repeat that he was taking Lisa home (780, 782). He noticed nothing unusual about the defendant's conduct (780).

People's Rebuttal

DANIEL W. SCHWARTZ, a psychiatrist, testified that he had examined the defendant for 2 1/2 hours on May 29, 1970 at the request of defense counsel (799-800, 801-802). The defendant spoke spontaneously, seemed alert, very pleasant and cooperative (805). He saw no evidence of delusions, hallucinations or disordered thinking (807). He found no paranoid schizophrenia or any underlying mental disease or defect (818-819). In his opinion the defendant did know and appreciate the nature of his conduct and that such conduct was wrong at the time of the offense (805).

Based on his conversation with the defendant and on the district attorney's statements as to the testimony, he believed that his motive for killing Lisa was one of anger at Clara for leaving him, and in the defendant's anger he struck out at

Clara's child (827). He felt that the autopsy report confirmed his opinion (827-828). In his judgment amnesia was not a symptom of paranoid schizophrenia (891).

DOCTOR JOHN LANZKRON, a psychiatrist, testified that he had been assistant director at Matteawan while the defendant was there from November 4, 1968 to September 30, 1969 and from December 17, 1970 to August 10, 1971 (896-897). His diagnosis of the defendant on August 5, 1971 was psychosis with anti-social personality, drug-dependence, LSD, marijuana, malingering and reactive features (909). In his opinion on July 24, 1968 the defendant did not lack substantial capacity to know or appreciate the nature of his conduct and its consequences or that it was wrong (900-901).

Defendant's Sur-Rebuttal

DOCTOR H. LAWRENCE SUTTON, a psychiatrist, examined the defendant on September 10, 1968 together with Dr. Pechstein in a court-ordered examination to determine the defendant's competency (938-940). He diagnosed the defendant as schizophrenic, chronic, paranoid type, requiring care and treatment in a hospital, suffering from hallucinations and delusions (846, 948). The illness had lasted for more than 11 years (947). He had reviewed all the available records (949). He believed the defendant was disorganized on the day of the crime (950).

DOCTOR HENRY P. PECHSTEIN, a psychiatrist, testified that on August 27, 1968 he examined the defendant and thought that he was suffering from an underlying nervous disorder which

could have been schizophrenic with evidence of alcoholic psychosis and possibly a drug psychosis (985). The defendant said that he thought little men and snakes were crawling about him and that he had no recollection of the events surrounding the crime (985). He examined the defendant again on April 6, 1970 and saw no evidence of mental disease and thought the defendant was in a state of remission (985-986, 991). On February 29, 1972 he thought the defendant showed symptoms of schizophrenia, paranoid thinking (981, 988). On May 30, 1972 the defendant exhibited severe symptoms of paranoid schizophrenia (989-990).

VERDICT AND SENTENCE

On April 4, 1974 the defendant was found guilty of manslaughter in the first degree, kidnapping in the first degree, and kidnapping in the second degree.

On May 3, 1974 the defendant was sentenced to an indeterminate term of up to 25 years imprisonment for manslaughter in the first degree and kidnapping in the second degree, and to an indeterminate term of 25 years to life imprisonment for kidnapping in the first degree, all the sentences to be served concurrently.

ARGUMENT

USE OF A PSYCHIATRIST PREVIOUSLY CONSULTED BY A CRIMINAL DEFENDANT ON THE ADVICE OF COUNSEL AS A PROSECUTION WITNESS IS A DENIAL OF THE RIGHT TO EFFECTIVE COUNSEL.

The petitioner interposed a defense of insanity at his trial in the state court. About two years after the crime Dr. Daniel Schwartz, at the request of the petitioner's attorney, examined the petitioner in the local jail (transcript of the trial, pp. 801-802, 841). Dr. Schwartz gave an oral report of his examination to defense counsel but was not thereafter contacted by the defendant or his attorney (848). The petitioner was subsequently examined by another defense psychiatrist, Dr. Morris Binder, who testified at the trial that the petitioner was insane at the time of the crime (645-646). However, two years before the trial, Dr. Schwartz had discussed his examination of the defendant with the District Attorney, and he was called as a rebuttal witness at the trial and testified over defense objection that in his opinion the petitioner was not suffering from any mental disease or defect at the time of the crime (801-805).

The petitioner contends that permitting the testimony of Dr. Schwartz constituted a violation of his right to counsel. The effect of the ruling by the New York State courts has been to substantially impair an attorney's

ability to make effective use of a psychiatric expert in preparing a defense for his client, because no longer can his client consult a psychiatrist in a relationship of trust and confidentiality. The New York attorney must now advise his client that he can never be certain that the psychiatrist he consults will not someday appear on the witness stand as a witness for the prosecution to assist in convicting the client with his very own words. Abrogation of the confidential relationship with the defense psychiatrist will seriously undermine use of an insanity defense for at least three reasons. First, absent a relationship of complete trust with the psychiatrist, the defendant will not feel fully free to explore his mental state with the psychiatrist. Second, the psychiatrist adopted as a prosecution witness will now become a fertile source to discover independent incriminating evidence against the defendant. Third, the prosecution will be alerted to the identity of psychiatrists who will be willing to challenge a defendant's claim of insanity. Such impairment of the use of psychiatric experts constitutes a gross violation of the constitutional guarantee of the assistance of counsel. United States v. Alvarez, 519 F.2d 1036 (3rd Cir. 1975); State v. Kociolek, 23 N.J. 400 (1957).*

The right to counsel guaranteed by the Sixth and Fourteenth Amendments has been held to require the "effective assistance" of such counsel. Powell v. Alabama, 287 U.S.

*The petitioner does not raise here, nor did he below, any claim that the physician-patient privilege would justify federal habeas relief. Hence this brief will not address that portion of the District Court's opinion which discussed the physician-patient privilege.

45, 71 (1932); Hintz v. Beto, 379 F.2d 937, 941 (5th Cir. 1967). The right to counsel is denied if the attorney must work "under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." Powell v. Alabama, supra, at 71. In fulfillment of the right to effective assistance a defendant's attorney must have access to any "specialized testimony which the case requires." Bush v. McCollum, 231 F.Supp. 560, 565 (N.D. Tex. 1964), aff'd 344 F.2d 672 (5th Cir. 1965). Thus, whenever an expert such as an accountant is necessary to assist in preparation of a case, the attorney must have unfettered access to such an expert, United States v. Kovel, 296 F.2d 918 (2nd Cir. 1961), and if the defendant is indigent, the state must pay for the expert's services. Mason v. Arizona, 504 F.2d 1345 (9th Cir. 1974).

In particular, whenever an insanity defense is being considered, "minimally effective representation of counsel" will require the use of "expert psychiatric assistance." United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974); see Bush v. McCollum, supra at 565. Indeed, the Fourth Circuit has held that "[t]he assistance of a psychiatrist is crucial" for an effective insanity defense.

In the first place, the presence or absence of psychiatric testimony is critical to presentation of the defense at trial. "In practical terms, a successful defense without expert testimony will be made only in cases

so extreme, or so compelling in sympathy for the defendant, that the prosecutor is unlikely to bring them at all."

Moreover the use of an expert for other, non-testimonial, functions can be equally important. Consultation with counsel attunes the lay attorney to unfamiliar but central medical concepts and enables him, as an initial matter, to assess the soundness and advisability of offering the defense. The aid of a psychiatrist informs and guides the presentation of the defense, and perhaps most importantly, it permits a lawyer inexpert in the science of psychiatry to probe intelligently the foundations of adverse testimony. "If an accused is to raise an effective insanity defense, it is clear that he will need the psychiatrist as a witness. He will need his aid in determining the kinds of testimony to be elicited, the specialists to be consulted, and the areas to be explored on cross-examination of opposing psychiatrists."

United States v. Taylor, 437 F.2d 371, 377 n. 9 (4th Cir. 1971) [citations omitted].

One of the essential prerequisites of effective representation by counsel is confidentiality of the attorney client relationship. Whenever there is a knowing or intentional intrusion by the prosecution into the confidentiality of the attorney client relationship, the right to the assistance of counsel is violated. Hoffa v. United States, 385 U.S. 293 (1966) (government informer privy to attorney-client conversations); Black v. United States, 385 U.S. 26 (1966) (government monitored attorney-client conversations). Even when such intrusion is not made for the purpose of

obtaining information and no information helpful to the prosecution is obtained or used, there is a violation of the right to counsel. Weatherford v. Bursey, 528 F.2d 483 (4th Cir. 1975), cert. granted 44 U.S.L.W. 3738. In Weatherford the court held that

whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial.

Id. at 486.

In the case at bar the invasion of the confidentiality of the attorney-client relation was no less secretive than that in Hoffa v. United States, supra; Black v. United States, supra; and Weatherford v. Bursey, supra. Until the decision by the New York State Court of Appeals in the instant case, there was no sanction in statute or case law for the use of a defense psychiatrist as a prosecution witness. Yet two years before the beginning of the trial and without notice to the defendant, the prosecution was able to consult with a psychiatrist whom the petitioner and his attorney had assumed would be a member of the defense team and to whom the petitioner had provided a great deal of damaging information about the crime. Unlike Weatherford, where the undercover agent provided no information obtained within the confidentiality of the attorney-client relationship, all of Dr. Schwartz'

information was obtained in confidence and proved to be extremely damaging to the petitioner.

There can be no doubt that the confidentiality of the attorney-client relationship extends to those agents or experts employed by an attorney in order to render effective assistance to his client. For example, it has long been recognized that an accountant whom a defendant in a tax fraud case has consulted on the advice of counsel is within the confidential attorney-client relationship. United States v. Kovel, supra; United States v. Judson, 322 F.2d 460 (9th Cir. 1963); United States v. Brown, 349 F.Supp. 420 (N.D. Ill. 1972). Likewise, with the exception of New York State, all jurisdictions that have considered the issue have concluded that a psychiatrist, consulted by a defendant on the advice of counsel in order to prepare an insanity defense, is within the confidentiality of the attorney-client relationship. United States v. Alvarez, supra; City and County of San Francisco v. Superior Court of the City and County of San Francisco, 37 Cal.2d 227 (1951) (Traynor, J.); People v. Lines, 13 Cal.3rd 500 (1975); Lindsay v. Lipson, 367 Mich. 1 (1962); People v. Hilliker, 29 Mich App. 543 (Ct. App. 1971); State v. Kociolek, 23 N.J. 400 (1957); State v. Sullivan, 60 Wash.2d 474 (1962)*

Frequently, the principle that confidentiality is a necessary part of the attorney client relationship is expressed in terms of "attorney-client privilege." The

*Singleton v. State, 90 Nev. 216, 522 P.2d 1221 (1974), is not to the contrary, since it rests solely on a theory of waiver. The defendant there had called several former attorneys to give evidence of his insanity. The court held that by calling his own attorneys, he had waived a claim of the confidentiality of (continued)

court below, recognizing that the issue is usually addressed in terms of "privilege," thus chose to give slight weight to the cases affirming the confidentiality of the attorney-psychiatrist-client relationship insofar as they do not speak in express constitutional terms. Indeed, the primary thrust of the opinion of the court below is to analyze the issue as if it were only a question of testimonial privilege. It is submitted that this thrust was erroneous because in criminal cases the attorney-client privilege is not merely one of testimonial privilege among others, such as priest-penitent privilege; rather it is coextensive with the Sixth Amendment's guarantee of the right to counsel because it is necessary for effective representation.

The purpose of the attorney-client privilege is to promote and preserve the effectiveness of counsel. Indeed the principle has been widely criticized because it may frustrate the pursuit of truth. See Morgan, Introduction to ALI Model Code of Evidence (1942), pp. 24-27.

There are no data to furnish a reasoned support of the [attorney-client] privilege in general.... In situations where the privilege against self incrimination is involved [i.e. criminal prosecutions], the retention of the privilege is justified. There the justification rests not on the attorney client privilege but upon a combination of the privilege against self-incrimination and the right of every person accused of crime to competent counsel.

Id. at 27. The same rationale has been made in the University of Chicago Law Review.

*(continued)

the attorney-client relationship. In the instant case the court below itself recognized that it would be "desirable" to include a psychiatrist consulted by a defendant at his attorney's request within the confidentiality of the attorney-client relationship (opinion below, A-22), but not constitutionally mandated.

[W]hatever one may think of the privilege in...civil cases..., the privilege remains justifiable in criminal cases, where it may be necessary to effectuate the right to counsel and the privilege against self-incrimination.

Comment, The Right of a Criminal Defense Attorney to Withhold Physical Evidence Received from his Client, 38 Univ. Chica. L.R. 211, 225-26. Even the above cases which are not explicitly constitutional in their rationale recognize that the issue is that of the effectiveness of counsel. Judge Friendly, writing for this court in United States v. Kovel, supra stated that "...the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit." Id. at 922. [emphasis supplied] Judge Traynor has also justified the existence of the privilege and its extension to psychiatrists consulted on the advice of counsel on the ground that it is necessary for "[a]dequate legal representation." City and County of San Francisco v. Superior Court of the City and County of San Francisco, supra, 231 P.2d, 26, 30.

At least three of the cited cases are explicit that the confidentiality of the attorney-psychiatrist-client relationship is based upon the constitutional guarantee of the right to counsel. In Alvarez, supra, the Third Circuit held that

[t]he effective assistance of counsel with respect to the preparation of an insanity defense demands recognition that a defendant be as free to communicate with a psychiatric expert as with the attorney [the psychiatrist] is assisting.

The issue here is whether a defense counsel in a case involving a potential defense of insanity must run the risk that a psychiatric expert whom he hires to advise him with respect to the defendant's mental condition may be forced to be an involuntary government witness. The effect of such a rule would...have the inevitable effect of depriving defendants of the effective assistance of counsel in such cases.

Id. at 1046. This language is surely more than "constitutional in tone" as the court below believed (see A-40 of the appendix). It is a clear statement that the federal Constitution, as well as the Federal Rules of Evidence, require confidentiality of the attorney-client relation.

The New Jersey Supreme Court has also found a constitutional basis for the attorney-client privilege.

The attorney-client privilege is basic to a relation of trust and confidence that, though not given express constitutional security, is yet essentially interrelated with the specific constitutional guarantees of the individual's right to counsel and immunity from self-incrimination....

State v. Kociolek, supra, 129 A.2d 417, 425 (1957). A recent California decision also uses explicit constitutional language.

The right to counsel includes the right to the use of experts such as psychiatrists or psychologists or any other expert that will assist counsel in preparing a defense...This right to assistance also includes the right to have any communications made to experts remain confidential....

Torres v. Municipal Court of Los Angeles Judicial District,
50 Cal App.3rd 778, 783-84 (Ct. App., 2nd Dist. 1975).

Since the confidentiality of the attorney client relation is founded on the guarantee of effective assistance of counsel, it was error for the court below to suggest that violation of this confidentiality in the instant case was justified by the "counterbalancing interest of the State in accurate fact-finding by its courts." (opinion below, A-43) Unless the right is waived, there are not varying degrees of the effectiveness of counsel to which one is entitled. No degree of need by the state would ever justify calling the defense counsel himself as witness (although he surely would be a most valuable witness in the search for truth); likewise no presumed need by the state should justify calling a defendant's psychiatrist who was consulted at the request of counsel. The proper question, therefore, is whether using the defendant's psychiatrist as a prosecution witness will significantly impair the effectiveness of the defendant's representation.

It is submitted that the effectiveness of representation is impaired in three distinct manners by the New York rule. First, the defendant considering an insanity defense will be chilled from being entirely open and frank with his psychiatrist, since he will know that the psychiatrist is not necessarily his psychiatrist but possibly a future

agent of the prosecution. In order for a psychiatrist fully to understand and hopefully to assist his patient, a relationship of the fullest trust is essential. But how can one trust someone who may later cooperate, as did Dr. Schwartz in this case, with those who are trying to send him to prison? The extreme difficulty in achieving a trusting relationship is even more apparent when it is recognized that the defendant consulting a psychiatrist will often be a disturbed person who has difficulty forming trusting relationships. (See, for example pages 812 and 820 of Dr. Schwartz' testimony at the trial [pages A-52, A-60 of the appendix].) If the relationship is an untrusting one, it is apparent that the psychiatrist may not be able to form an informed opinion whether the defendant has a mental disease or defect, and the defendant may thereby be deprived of a valid defense.

A second prejudice to a defendant's case and a further reason he would be reluctant to speak frankly with a psychiatrist, would be the possibility that the defense psychiatrist would render investigative assistance to the prosecution. While, as the court below recognized (see pages A-32 to A-33 of the appendix), the testimony of a defendant's psychiatrist could not be received as evidence of the substantive offense, Matter of Lee v. County Court of Erie County, 27 N.Y.2d 432 (1971), the psychiatrist

could render investigative assistance to the prosecution by informing them long before the trial of evidentiary matters learned from the defendant. Thus, after having "told all" to a psychiatrist who later becomes an agent for the prosecution, the defendant may be seriously prejudiced as to defenses other than that of insanity. In view of this possibility, a defense counsel may be reluctant to send his client to a psychiatrist unless he has concluded that insanity will be his only defense.

A third type of prejudice to a defendant from the New York rule will be the fact that by consulting a psychiatrist whom he later chooses not to call as a witness on his behalf, the defendant will alert the prosecution to the identity of a psychiatric witness favorable to the prosecution. Since the burden of proving the defendant's guilt and his sanity rests wholly on the prosecution, elementary fairness dictates that the prosecution not be given an edge in discovering psychiatrists favorable to their side.

As the court below recognized (A-28), the petitioner has never waived his right to confidentiality in his relationship with his attorney and psychiatrist. He did not call Dr. Schwartz as a witness nor did he make any reference to Dr. Schwartz' opinion. What he did waive by presenting an insanity defense was his right to keep secret the facts upon which that claim is based. Thus the prosecution quite rightly could require him to submit to examination by a

prosecution psychiatrist. Matter of Lee v. County Court, supra. But the petitioner did not waive his right to consult with one or more psychiatrists who would be exclusively in the defense camp; he did not waive his right to confidentiality with the psychiatrists of his own choosing.

Finally, there is no unfair advantage to a defendant if the prosecution is precluded from calling psychiatrists previously consulted by the defendant. Under New York procedure a defendant who wishes to plead an insanity defense must give prior notice to the prosecution, N.Y. Criminal Procedure Law §250.10, and he must cooperate fully with a psychiatrist whom the prosecution has retained to examine the defendant or be precluded from offering on his own behalf any expert testimony as to his insanity. Matter of Lee v. County Court of Erie County, supra. Because notice of an insanity defense must be given within thirty days of indictment, CPL 250.10, the prosecution has ample opportunity to have a defendant examined at a point in time close to the crime. Nor can there by any realistic concern, as suggested by the respondent below, that a defendant will "shop around" to be examined by unfavorable psychiatrists and thereby remove them from the pool of available psychiatrists. There are far too many psychiatric experts available and their advice is too costly for that to be a realistic possibility. In short, the New York rule does not redress any supposed disadvantage the state has in proving a defendant's sanity.

CONCLUSION

FOR THE ABOVE REASONS THE ORDER OF THE
DISTRICT COURT SHOULD BE REVERSED.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HERBERT EDNEY,

Petitioner-Appellant : AFFIDAVIT OF SERVICE

- against - BY MAIL.

HAROLD SMITH, Superintendent, Attica
Correctional Facility,

Respondent-Appellee :

STATE OF NEW YORK)) ss.:
COUNTY OF NASSAU)

Melissa Keane being duly sworn deposes and says
that she is a clerk in the office of James J. McDonough, Attorney
in Charge, Legal Aid Society of Nassau County, N.Y., Criminal
Division, attorney for the above named defendant Herbert
Edney herein. That she is over 18 years of age, and
resides at Mineola, New York. That she served the within brief
and appendix on the 14th day of January 19 77

upon Hon. Denis Dillon
District Attorney
262 Old Country Road
Mineola, New York 11501

by depositing true copies of same securely enclosed in a post-paid wrapper in the Letter Box, maintained and exclusively controlled by the United States at 400 County Seat Drive, Mineola, New York.

Sworn to before me this
14th day of January, 1977
Lorraine C. Fager

~~LORRAINE C. GAGAS~~
Notary Public, State of New York
No. 3-1254
Qualified in Nassau County
Commission filed in Nassau County
Commission Expires June 30, 1971